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Attorneys for Defendant Derek Ashton

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

**BRANDON LEE RUSSELL, CHRYSTAL  
RUSSELL, JIM ROE IV, GLENDA ROE**  
and their family members

**06-CV-\_\_\_\_\_**

Plaintiffs,

**NOTICE OF REMOVAL  
OF CIVIL ACTION**

v.

**SMRK LLC, doing business as TOM'S  
PEACOCK and/or TOM'S PEACOCK  
BAR & GRILL, STEPHANIE MATHER,  
and DEREK ASHTON,**

Defendants.

Defendant Derek Ashton alleges:

1. Defendant Derek Ashton is a defendant in a civil action originally filed on June 16, 2006, in the Circuit Court of the State of Oregon for the County of Benton, Case No. 06 10286, entitled *Brandon Lee Russell, Chrystal Russell, Jim Roe IV, Glenda Roe and their family members*

*v. SMRK, LLC, doing business as Tom's Peacock and/or Tom's Peacock Bar & Grill, Stephanie Mather, and Derek Ashton.*

#### TIMELINESS OF REMOVAL

2. Defendant Derek Ashton has not yet been served with summons and complaint. Defendant Ashton's office received a signed copy of the complaint and the summons on June 26, 2006; this removal is timely pursuant to 28 USC § 1446(b).

3. True and complete copies of all of the process and pleadings received by Defendant Ashton with regard to this action are attached as Exhibit No.1 and no further proceedings have been had.

#### BASIS FOR JURISDICTION

4. Plaintiffs have alleged a claim against Defendant Ashton based on the Americans With Disabilities Act, 42 USC Section 12100 *et seq.*

5. This court has original jurisdiction over this action based on federal question jurisdiction pursuant to 28 USC § 1343 and/or 28 USC § 1331.

#### JOINDER OF CO-DEFENDANTS

6. The remaining Defendants in this case have not been joined with regard to this Notice.

7. Defendant Ashton is not aware of whether the remaining Defendants have been served with summons and complaint.

8. Defendant Ashton is not aware of whether the other Defendants are represented by counsel and, if so, who their attorney is.

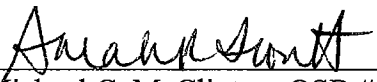
9. Consequently, Defendant Ashton has been unable to determine the position of the

other Defendants with regard to the removal of this action from state court to federal court.

WHEREFORE, Defendant Ashton files this notice to remove the action, now pending in the Circuit Court of the State of Oregon for the County of Benton, Case No. 06 10286, from that court to this Court.

DATED this 20<sup>th</sup> day of July, 2006.

McCLINTON & TROUTT LLC

By   
Michael C. McClinton, OSB # 72156  
Sarah R. Troutt, OSB #95442  
(503) 361-3910

Attorneys for Defendant Derek Ashton

COSGRAVE VERGEER & KESTER  
RECEIVED

JUN 26 2006

Noted By \_\_\_\_\_ Spindle \_\_\_\_\_

Filed By \_\_\_\_\_

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF BENTONBrandon Lee Russell, Chrystal Russell,  
Jim Roe IV, Glenda Roe and their family  
members

Plaintiffs,

vs.

SMRK LLC, doing business as Tom's  
Peacock and/or Tom's Peacock Bar &  
Grill, Stephanie Mather, and Derek  
Ashton

Defendants.

Case No. 06 10286

COMPLAINT for Violation of  
Americans with Disabilities Act and  
Oregon's similar law, and for negligence

Not subject to mandatory arbitration.

Jury trial demanded.

Ans due: 7/26/06 Rms

Plaintiff Brandon Russell alleges FOR A FIRST CLAIM, UNLAWFUL DISCRIMINATION  
BASED ON DISABILITY, as follows:

1.

This is a claim for damages for discrimination by a public accommodation based on failure to accommodate a person with a disability. Defendant SMRK, LLC owns and manages a bar and grill in Corvallis Oregon. On March 30, 2006, Brandon Russell was at the Peacock playing pool for the Peacock's pool team, when he suffered an epileptic seizure. He had not consumed any alcohol. He was trying to pour himself a glass of water when the seizure began, and he spilled some water. He also lost the ability to speak promptly or clearly, and so could not explain or protest. Employees of the Peacock forced him out of the bar and out onto the sidewalk, where it was raining. The employees caused Russell to fall off the curb into the rain-filled gutter, scrape and cut his head, and lie in the rain. The employees refused to allow him to wait in a fenced off

## COMPLAINT

Russell et.al. v. SMRK, LLC

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EXHIBIT NO. 1, Page 1 of 5

Roy Smith  
Attorney at Law  
P.O. Box 1812  
Corvallis, OR 97339  
(541)757-1533

area of the sidewalk where he would have been out of the rain, while his family was called and while waiting for an ambulance.

2.

Discrimination against a person with a disability consists of failure to make reasonable accommodations in rules and policies so that such a person may enjoy the facilities the same as those without the disability. Defendant is required to make an exception to any policy that applies to drunk or disruptive patrons so that those with a seizure disorder are not ejected or subjected to humiliation, including making reasonable inquiry of companions about the cause of any behavior that might be associated with both drunkenness and a seizure. Such an inquiry was not made before removal of Brandon Russell from the building; nor were subsequent explanations by family and/or friends heeded, even after ambulance staff confirmed that Russell suffered a seizure.

3.

This action arises under the Americans with Disabilities Act, 42 U.S.C. 12100 et seq. and ORS 659A.142(3). Brandon Lee Russell is a person with an epileptic seizure disorder that substantially interferes with one or more major life activities, and the Peacock is a public accommodation.

4.

Defendant's employees are not adequately trained about the ADA and state law protecting people with disabilities.

5.

Brandon Russell was injured by defendant SMRK's conduct, both physically and emotionally. He is entitled to damages of \$100,000. He is also entitled to injunctive relief in the form of appropriate orders of the court which require defendant to obtain proper training for its employees, and which require defendant to permit plaintiff to use the business at will.

6.

Plaintiff is also entitled to an award of statutory attorney fees pursuant to the ADA and ORS 659A.885(1).

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# COMPLAINT

*Russell et.al. v. SMRK, LLC*

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EXHIBIT NO. 1, Page 2 of 5

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Attorney at Law  
P.O. Box 1812  
Corvallis, OR 97339  
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FOR A SECOND CLAIM, FOR **RETALIATION** FOR COMPLAINING OF  
DISCRIMINATION, BRANDON RUSSELL alleges:

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7.

Brandon Russell incorporates paragraphs 1. through 6.

8.

After counsel for Russell complained of the discrimination, defendant barred Brandon Russell,  
his wife Chrystal Russell, and both their families and friends from the bar.

9.

Stephanie Mather is a person registered with the state as an agent for defendant. She told Jim  
Roe, Brandon Russell's step-brother, that her attorney, (Derek Ashton), told her to bar Brandon  
and the families and friends of the families.

10.

Retaliation against a complainant of discrimination, or against an advocate for the complainant,  
is unlawful.

11.

Brandon Russell is entitled to damages of \$20,000 for humiliation and emotional distress, and for  
attorney fees.

**FOR A THIRD CLAIM, BY ALL PLAINTIFFS OTHER THAN BRANDON RUSSELL,  
FOR RETALIATION, it is alleged:**

12.

Paragraphs 1. through 11. are incorporated.

13.

Plaintiffs have been barred from using the bar, for no conduct of their own other than helping  
Brandon Russell assert his claim for discrimination and being related to him. Both Mathers and  
Ashton are individually liable for conduct constituting retaliation.

14.

Plaintiffs, other than Brandon Russell, are entitled, each, to damages of \$10,000, injunctive  
relief, and attorney fees.

**COMPLAINT**

***Russell et.al. v. SMRK, LLC***

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EXHIBIT NO. 1, Page 3 of 5

Roy Smith  
Attorney at Law  
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FOR A FOURTH CLAIM, FOR NEGLIGENCE, BRANDON RUSSELL alleges:

15.

Brandon Russell incorporates paragraphs 1. through 5.

16.

Defendant SMRK had a duty to take measures when it removed Brandon Russell from the bar, to make sure he did not fall on the sidewalk and that he did not suffer cold, wet conditions for an unreasonable time. SMRK violated both duties. It also had a duty to try to involve the family inside the bar in the removal of Russell and for his care outside. Russell was injured by said negligence. He suffered physical injury, with pain and suffering, in the amount of \$15,000.

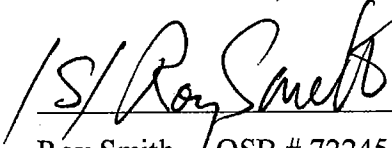
17.

More than 10 days before this action was filed, notice was given that satisfies ORS 20.080, and Russell is entitled to attorney fees if his recovery is \$5,500 or less.

WHEREFORE, plaintiffs pray for judgment for \$165,000 plus costs, prevailing party fee, attorney fees, and injunctive relief:

Plaintiffs request a jury trial.

Dated this June 15, 2006

  
\_\_\_\_\_  
Roy Smith OSB # 72245  
Attorney for Plaintiffs

**COMPLAINT**

***Russell et.al. v. SMRK, LLC***

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EXHIBIT NO. 1, Page 4 of 5

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**COSGRAVE VERGEER & KESTER  
RECEIVED**

**JUN 26 2006**

Noted By \_\_\_\_\_ Spindle \_\_\_\_\_

Filed By \_\_\_\_\_

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF BENTON

**Brandon Lee Russell, Chrystal Russell, Jim Roe  
IV, Glenda Roe and their family members**

Plaintiffs,

vs.

**SMRK LLC, doing business as Tom's Peacock  
and/or Tom's Peacock Bar & Grill, Stephanie  
Mather, and Derek Ashton**

Defendants.

Case No.0610286

**SUMMONS**

**TO: Derek Ashton c/o Cosgrave Vergeer Kester LLP, 805 SW Broadway, 8t Floor, Portland, OR 97205**

You are hereby required to appear and defend the complaint filed against you in the above entitled cause within 30 days from the date of service of this summons upon you, and in case of your failure to do so Plaintiff will apply for to the court for the relief demanded in the complaint.

**NOTICE TO DEFENDANT:**

**READ THESE PAPERS**

**CAREFULLY!**

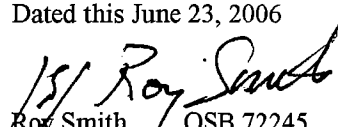
You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

If you have questions, you should see an attorney immediately. If you need help in finding an attorney, you may call the Oregon State Bar's Lawyer Referral Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.

I, Roy Smith, attorney for plaintiff, certify that this is an exact and complete copy of the original summons in the above entitled case.

  
Attorney of record for plaintiff

Dated this June 23, 2006

  
Roy Smith OSB 72245  
Attorney at Law  
P.O. Box 1812  
Corvallis, OR 97339  
(541)757-1533



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Attorneys for Defendant Derek Ashton

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

**BRANDON LEE RUSSELL, CHRYSTAL  
RUSSELL, JIM ROE IV, GLENDA ROE**  
and their family members

**06-CV-\_\_\_\_\_**

Plaintiffs,

**CERTIFICATE OF SERVICE**

v.

**SMRK LLC, doing business as TOM'S  
PEACOCK and/or TOM'S PEACOCK  
BAR & GRILL, STEPHANIE MATHER,  
and DEREK ASHTON,**

Defendants.

I, Sarah R. Troutt, one of the attorneys of record for Defendant Derek Ashton in this action,  
certify that on July 20, 2006, I personally served a copy of the attached Notice of Removal of Civil


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Action on Roy Smith, the Plaintiffs' attorney, by mailing the copy to Roy Smith at the following address: Roy Smith, Attorney at Law, P.O. Box 1812, Corvallis, OR 97339.

DATED this 20<sup>th</sup> day of July, 2006.

McCLINTON & TROUTT LLC

By   
Michael C. McClinton, OSB # 72156  
Sarah R. Troutt, OSB #95442  
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Attorneys for Defendant Derek Ashton